In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, ET AL.,

Petitioners

vs.

ROBERT TROYAN, ET AL.,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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RESPONDENTS BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 520 F.2d 492, and is contained in Petitioner's Appendix at page A-59.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, is reported at 363 F. Supp. 1131 (N.D.Ohio 1973) and is

contained in Petitioner's Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1975. (A-59). A Petition for Rehearing was denied on August 21, 1975. (A-71). The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a legislatively established classification based on height for eligibility to be a police officer, which classification has an exclusionary impact on both males and females (although females to a somewhat greater degree), a classification based on a constituionally "suspect" category or a classification which impinges upon a constitutionally "fundamental" right which requires strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment?

2. If a social policy is to be undertaken, viz., lowering height requirements to broaden employment oppor-

tunities in police departments for both males and females, should the legislative branch of government decide whether to undertake the policy and set the limits of lowering the height requirement, or should the judicial branch under an interpretation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution set the policy and completely abolish any height requirements?

3. Is the Due Process Clause to the Fourteenth Amendment of the United States Constitution offended when the legislative branch of Government establishes a fixed height standard for applicant eligibility as a candidate to a police department?

4. Does the petitioner, who has been found not to satisfy the constitutionally valid height requirement for eligible applicants to the East Cleveland Police Department, still have standing to challenge the validity of the written examination?

5. Did the petitioner make out a prima facie case of racial discrimination in the hiring process for police officers in East Cleveland Police Department?

6. Assuming, arguendo, that a prima facie case of racial discrimination has been shown in East Cleveland's police officers' entrance standards,

is the East Cleveland written examination sufficiently job related to be upheld?

CONSTITUTIONAL PROVISION INVOLVED

U.S.Const. Amend.XIV. Sec. 1

> . . . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action was commenced by a single plaintiff on March 23, 1973, the day before the City of East Cleveland was scheduled to conduct examinations to fill six vacancies in a police department which has an authorized strength of 71 Civil Service positions. The petitioner named as defendants the City of East Cleveland; Curtiss C. Hall, the City's black, male, city manager; Robert Troyan, the City's white, male, police chief; Mae E. Stewart, a black female City Commissioner; Reginald Raines, a black male City Commissioner; James W. G. Watson, a white, male, City Commissioner; Charles E. Moseley, a black, male,

City Commissioner; Jane B. Young, a white, female, City Commissioner; Reginald Gower, a white, male Civil Service Commissioner; James Richey, a black, male Civil Service Commissioner; and certain "federal defendants" including the Administrator and Regional Director of the Law Enforcement Assistant Administration.

The City's Civil Service entrance examination consists of (a) a written test, (b) an athletic test, (c) a physical examination conducted by the Director of Health, a physician, which includes a height measurement and (d) an oral interview and background investigation. Because of the District Court's injunction, the petitioner was allowed to take the written test and athletic test despite the fact that she did not meet the requirements of East Cleveland Administrative Code §123.07(d) which requires police applicants to be at least 5'8" in height. The petitioner failed to score sufficiently high on the written examination to qualify with other eligible applicants for the oral interview and background investigation; and, accordingly, in the instant suit she amended her Complaint to challenge not only the City's height requirement but also its reliance on the written examination.

The evidence at the non-jury trial, which commenced on May 15,1973, established that East Cleveland is a suburb

of, and physically adjoins the City of Cleveland. The physical area of the City contains some 3.5 square miles of land in which reside approximately 39,600 people, giving East Cleveland one of the highest population densities of any municipal corporation in Ohio. There has been a significant transition in the population characteristics of the City during the past 10 years. For example, in 1965 the City was approximately 10% black with an all white police force. Some 8 years later, in 1973, the City had an approximately 60% black population with a police force of 9 blacks out of a total authorized strength of 71 or 12.7%. At the time this matter was heard by the Court of Appeals, in part because of the injunctions of the District Court, there were 8 vacancies on the police force and the 9 black officers comprised 14.3% of the total force.

During the course of the years there have only been two female applicants for police officer position. The first, Gloria Webb, met the height requirements and fully completed taking the entrance examination. The other, the petitioner, was disqualified upon her initial application because she did not meet the height requirement.

At trial, the City presented extensive and varied testimony concerning the validity of the height requirement. Police officers from

the City Police Department, all with extensive experience, testified as to the psychological advantage of a taller officer, and the advantage of height in effecting arrests and rendering emergency aid. In a representative sample of 3895 East Cleveland arrestees the average height of all arrestees was 5'9" and over 85% of the arrestees were males. Further evidence was introduced as to the widespread usage of height minimums by various state and local police departments throughout the country.

The evidence further established that in recent years, the City Manager, (who is black) the three Civil Service Commissioners (of whom two of three are black) and the five City Commissioners (of whom three of five are black) have entered into an extensive recruiting program to obtain qualified blacks on their police force. This recruiting program has been successful since during the years 1969-72 of the 549 persons applying for the position of police officer in the City, 33 percent were black; and of the officers eventually hired during this period, 29 percent were black (7 of 24).

During the 1973 examination process of the black applicants, 75 percent were veterans or had military experience while 63.5 percent of the white applicants were not veterans. Concerning their educational background, however, it appeared that 65

percent of the white applicants had some college background while 35 percent of the black applicants had some college background. This educational differentiation was explained by a Civil Service Commissioner to have occurred because the white applicants were more oriented toward career police work with a law enforcement background, while many of the blacks, because of the City's extensive minority recruiting program, were merely attempting to obtain a job and were not career oriented police candidates.

The written examination was only one portion of the City's total hiring process, accounting for approximately 56 percent of the total possible points. While the Civil Service Commissioners were aware of the minority recruiting problems experienced by other cities through the use of their written examinations, the Civil Service Commissioners determined to retain the use of the written examination because the test gave the City the caliber of police officers it needs and, with more recruiting, the City expects to get more highly educated blacks to take the examination. The predictive nature of the written examination was, in part, established by a high correlation coefficient between success on the test and success in the mandatory Ohio police officers training course which all East Cleveland police officer appointees

attend immediately upon their appointment; with efficiency service ratings applied to East Cleveland patrol officers by their superior officers; and with success on the sergeant's promotional examination. Further, the Chief of Police uncontradictedly testified that the sergeant's examination was related to measuring proficiency in various job functions of East Cleveland Police Department.

REASONS FOR DENYING CERTIORARI

1. The Due Process Clause of the Fourteenth Amendment is Inapplicable to the Instant Case.

Petitioner argues that the minimum height requirement imposed by East Cleveland Administrative Code §123.07(b) amounts to a conclusive presumption which is neither necessarily or universally true and is alleged to be in violation of the Due Process Clause of the Fourteenth Amendment. Respondents contend that there has been no violation of the Due Process Clause since petitioner has not been deprived of a constitutionally recognized right of "life, liberty or property" nor are reasonable, legislatively enacted entrance standards "irrebutable presumptions" in violation of the Due Process Clause.

A. There has been no deprivation of "life, liberty or property."

Unlike the working women in Cleveland Board of Education v.LaFleur, 414 U.S. 632 (1974), the petitioner in the instant matter does not have a job with East Cleveland but is merely an applicant for a governmental job. Thus, apart from the issue of an "irrebutable presumption" in the City's height standard, the petitioner has not been deprived of a constitutionally recognized right of "life, liberty or property" which deserves Due Process protection. Roth v. Board of Regents, 408 U.S. 564, 569 (1972). Obviously, the petitioner has not been deprived of life, and we doubt very seriously whether the occupation of a police officer falls within the definition of "the common occupations of the community" alluded to in Truax v. Raich, 239 U.S. 33, 41 (1915) wherein a cook was sought to be deprived of his job. East Cleveland's concern in this matter goes beyond merely providing employment opportunities in its Police Department but extends to protecting the lives and property of its citizens. More appropriately, the petitioner might claim that she is deprived of a property right recognized by the Constitution. However, it has been repeatedly held in this court as well as other courts that there is no constitutionally protected right to governmental employment as such. Roth v. Board of Regents,supra;

Bailey v. Richardson, 182 F. 2d 46 (D.C. Cir.1950) aff'd. 341 U.S. 918 (1951); Orr v. Trinter, 444 F. 2d 128 (6th Cir.1971). See also Weisbrod v. Lynn, 383 F. Supp. 933 (D.C.Cir. 1974) (3-judge court) aff'd. _____U.S., 43 L. Ed. 2d 420 (Feb.24,1975) (dismissed for want of substantial federal question Due Process challenge to U.S. Government mandatory retirement age of 70), McIlvane v. Pennsylvania, 309 A. 2d 801 (Pa.1973), dism'd. for want of subst. Fed. question _____U.S._____ 7 FEP Cases 586 (1974) (Pennsylvania State Police Mandatory Retirement Age of 60 constitutional); Cannon v. Guste, _____F. Supp._____ 11 FEP Cases 675 (E.D. La. May 5,1975) (3-Judge Court), aff'd mem. _____U.S._____ 11 FEP Cases 715 (Nov. 3,1975) (Louisiana Mandatory 65 age retirement for Civil Service employees constitutional). As stated by this Court in Board of Regents v. Roth, supra at 577:

> "To merit due process protection, a person must have more than an 'abstract desire' or even a compelling personal need for the interest in question; he must be able to establish a 'legitimate claim of entitlement to it.'"

Accordingly, petitioner has not been deprived of an interest encompassed by the Fourteenth Amendment protection of liberty and property.

B. It is constitutionally permissible for a legislature to set entrance standards.

The mere fact that East Cleveland has set standards in its legislation does not call for a violation of the Due Process Clause. While respondents believe the height standards are reasonable and justifiable, it should be of no concern to the Court that the legislative body of East Cleveland has drawn a particular classification which may be less than perfect, Dandridge v. Williams, 397 U.S. 471, 485 (1970), or that the classification chosen by the City attacks only one aspect of the particular problem and not another. Williamson v. Lee Optical Co., 348 U.S. 483 (1954).

To challenge legislation on the grounds that it creates an "irrebutable presumption" does no more, in reality, than challenge the concept of a legislature as a line drawing body. Obviously, when local legislation setting standards is called in to question a great many people may have various reasonable ideas of what standards are appropriate. However, merely because there may be a good many "talking points" against the standards set forth in the legislation does not give a court authority to declare the legislation unconstitutional. Although arising in a different factual setting, this Court in Village of

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) set forth the proper test when the standards of local legislation are challenged:

> "Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves . . . .. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view

> was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinances in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'"
> 272 U.S. 365, 388-89. (1926) (Citations omitted).

Based on the foregoing, we submit the standards of the East Cleveland legislation do not violate the Due Process Clause of the Fourteenth Amendment.

2. Petitioner's Equal Protection Clause Sex Discrimination Claims

A. Since this case was brought solely as an Equal Protection Clause case, it would be inappropriate at this stage of the proceedings to consider whether Title VII standards should apply.

This case was brought solely as an Equal Protection Clause case pursuant to 42 U.S.C.§1983. The Respondents

defended themselves solely upon their analysis of the constitutional standards required by the Equal Protection Clause, and the facts in the record have been weighed by the District Court and Court of Appeals solely upon the constitutional standard. It therefore seems totally inconsistent at this stage of the proceedings to attempt to interject a new standard, the legislative standard of Title VII, 42 U.S.C. §2000e et. seq. and to weigh whether the Respondents' actions (based on facts in their defense to an Equal Protection Clause claim) violate those standards.

Assuming, arguendo, that this issue may now be raised, the recent case of Geduldig v. Aiello, 417 U.S. 484 (1974) provides ample precedent that the legislative standards of Title VII should not be transposed to the Equal Protection Clause. Geduldig upheld the constitutionality under equal protection challenges of a pregnancy exclusion clause from coverage of the California Disability Insurance System that pays benefits to persons in private employment who are temporarily unable to work because of a disability and not covered by Workmen's Compensation, despite the fact that the Equal Employment Opportunity Commission had issued a guideline under Title VII which would have

prohibited such a policy. Further, some months after Geduldig the issue of pregnancy exclusion from temporary disability benefits was relitigated in a California Federal Court, this time under Title VII, and such an exclusion was found unlawful. Vineyard v. Hollister School District, 64 F.R.D. 580 (N.D. Cal. 1974).

Although we believe the Respondents' policies are in compliance with Title VII, we do recognize that Congress in its legislative powers may perhaps regulate an area more broadly than the judiciary would interpret the Equal Protection Clause. See Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966). See also Monaghan, The Supreme Court, 1974 Term, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1,26-30 (1975). Thus, Respondents do not believe it necessary to examine the issue of whether Title VII liability is present in this case.

B. The Court of Appeals applied the proper Equal Protection Clause standard.

In examining the Respondents' height requirement under the traditional "rational relationship" standard, the Court of Appeals for the Sixth Circuit considered the fact that the height requirement had an exclusionary impact on both males and females, although females to a somewhat greater degree. As such, the Respondents' policies

did not create a classification which was gender-based as such. Moreover, even if the Respondents' height requirement policy would be construed to be a gender related classification, the Court of Appeals would have been justified in relying upon a long line of cases which have declined to subject such legislative classifications to "close" judicial scrutiny. See Schlesinger v. Ballard, 419 U.S.498 (1975); Geduldig v. Aiello, 417 U.S. 484, (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Reed v. Reed, 401 U.S. 71 (1971); Williams v. McNair, 401 U.S. 951 (1971) aff'g. 316 F. Supp. 134 (D.S.C. 1971) (3-Judge Court); Hoyt v. Florida, 368 U.S.57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Radice v. New York, 264 U.S. 292 (1924); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Mueller v. Oregon, 208 U.S. 412 (1908).

Recent possible exceptions to this long line of cases are the plurality decision in Fronterio v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), and Taylor v. Louisiana, 419 U.S. 522 (1975). While these cases invalidated explicit sex-based classifications under a "heightened" judicial examination, they all involved two factors which are not present in this case; namely, the classification was based explicitedly on sex, and the sex-based classification was justified solely upon administrative convenience grounds. Since the classification in the instant case is not

explicitedly gender-based and since the height standard was developed upon the good faith legislative finding that it assisted the police officers in the performance of their duties, the Court of Appeals correctly applied the more traditional Equal Protection Clause standard to the essentially undisputed facts in this case.

3. Petitioner's Equal Protection Clause Racial Discrimination Claims

After the petitioner was granted injunction by the District Court to take the City's examination battery and after she performed poorly on the written examination, she was granted leave to amend her Complaint to challenge the written examination on the grounds that it unconstitutionally discriminated against her on the basis of her race and sex. At the Court of Appeals level, the Respondents challenged her standing to raise these issues once the height requirement was found to be valid since she had not met the conditions precedent of being a qualified applicant eligible to take the written examination. Ex parte Levitt, 302 U.S. 633 (1937); McDonald Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Smiley v. The City of Montgomery, 350 F. Supp. 451 (N.D. Ala.1972); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga.1968), aff'd. 393 U.S. 266 (1968); see also Laird v. Tatum, 408 U.S. 1 (1972). The Court of Appeals for the Sixth Circuit found it unnecessary to consider this issue; but,

rather, proceeded to examine the petitioner's racial discrimination claim and found that the petitioner had failed to establish a prima facie case of racial discrimination in the municipality's total hiring process.

Petitioner's position concerning racial discrimination appears to present a proposition without legal precedent. She argues that because a certain group of blacks do not do as well as a certain group of whites, regardless of their educational background, on one particular segment of a written examination (e.g., verbal portion of the Army General Classification Test), a prima facie case of racial discrimination in hiring is thereby proven. The cases cited by petitioner at pages 23-24 of her brief do not support her position on this issue since in all of these cases the racially disproportionate impact upon minorities in the pass or fail rate of a written examination carried through to a disproportionate impact on minorities in the total hiring process.

In the instant case however, no disproportionate impact on minorities in the total hiring process was proven, and, accordingly, no prima facie case of racial discrimination was established. See e.g., Developments in the Law - Employment Discrimination, 84 Harv. L. Rev. 1109, 1118 (1971). Carried to its logical extreme, the petitioner's theory concerning the fragmentation of a written examination would allow any dis-

gruntled minority candidate to challenge the constitutionality of a total hiring process (which hired a proportionate number of a minority class based on the applicant pool) on the grounds that minorities had a disproportionately high failure rate on a particular question. Respondents would disagree with this proposition and would state that a plaintiff must show that the standard in question (e.g., the total examination process) has a differential impact on a protected minority group in order to prove a prima facie case. Further, the plaintiff must show the differential impact on the minority class in hiring by substantial and meaningful statistics. Without such a showing, the hiring employer should be able to continue to use the standard in question whether it is the "best" standard in terms of job-relatedness or not.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three (3) copies of the Brief of Respondents in Opposition were deposited in the regular U.S. mail, postage prepaid, on the 15th day of December, 1975, addressed to Jane M. Picker, 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio 44115, attorneys for the plaintiff-petitioner.

/s/ Paul W. Walter
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